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No. 88-914

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,
*Petitioner,*

VS.

MARK ALAN RADKE,
*Respondent.*

**On Petition for Writ of Certiorari**
**To the California Court of Appeal**
**Fourth Appellate District, Division One**

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

Petitioner, The People of the State of California, respectfully replies to Respondent's Brief as follows.

## SUPPLEMENTAL STATEMENT OF THE CASE

At the time the instant petition was prepared, the California Court of Appeal had stayed the issuance of its remittitur until December 3, 1988. Since that time the Court of Appeal has successively stayed the issuance of its remittitur to December 15, 1988, and to January 18, 1989.

In his Statement of the Case Respondent notes that he filed a motion to suppress evidence in the Municipal Court prior to the preliminary hearing in this case, and that Petitioner did not file a response at that time.

Petitioner points out, however, that under the state's statutory scheme as set forth in California Penal Code section 1538.5, neither party is required to file a written pleading in connection with a motion to suppress evidence at the preliminary hearing. Thus, the presence or absence of a written pleading by one or both of the parties is meaningless.

Moreover, the Court of Appeal opinion challenged by Petitioner did not deal with the ruling made at the preliminary hearing. Instead, it dealt with, and vacated, the subsequent order of the Superior Court which had denied Respondent's motion to suppress. Thus, although Respondent's motion was denied at both the preliminary hearing and the later Superior Court hearing, only the latter is material here.

In a similarly irrelevant vein Respondent refers to a declaration which he filed prior to the preliminary hearing and in which he claimed the police pointed guns at his head. However, that document was inadmissible hearsay which was never offered nor received in evidence at any stage of this case, and Petitioner therefore had no occasion to object to it. It was meaningless then and remains meaningless now.

## ARGUMENT

### I

### REVIEW SHOULD NOT BE DENIED ON THE GROUND THE OPINION OF THE CALIFORNIA COURT OF APPEAL IS UNPUBLISHED.

Respondent contends review should be denied because the opinion is unpublished and, therefore, cannot properly be cited as precedent.

Respondent is wrong. This Court often grants review by certiorari notwithstanding the fact the opinion under review is unpublished (See, *e.g., Rhodes v. Stewart* (1988) 488 U.S. ____ (102 L.Ed.2d 1); *Griffith v. Kentucky* (1987) 479 U.S. ____ (93 L.Ed.2d 649); *Rose v. Clark* (1986) 478 U.S. 570 (92 L.Ed.2d 460)).

Nonpublication is irrelevant to this Court's decision to grant or deny review. Thus, in granting certiorari recently in a tax case, the Court stated in *Commissioner v. McCoy* (1987) 484 U.S. ____ (98 L.Ed.2d 2, 7),

> "We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished.
>
> "Certiorari is therefore granted and the order of March 2, 1987, is reversed."

Accordingly, Respondent's contention must be rejected.

## II

## REVIEW SHOULD NOT BE DENIED ON THE GROUND PETITIONER IS SEEKING REVIEW OF ADVERSE FACTUAL FINDINGS.

Respondent contends review should be denied because Petitioner is merely seeking review of adverse factual findings. That contention is wrong.

The facts in this case are set out plainly in the petition. Respondent does not dispute any of those facts. However, he does attempt to confuse the facts by referring improperly to the thought processes of the police. The irrele-

vance of such matters was clearly established in *Berkemer v. McCarty* (1984) 468 U.S. 420, 442 (82 L.Ed.2d 317, 336):

> "Although Trooper Williams apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, Williams never communicated his intention to respondent. *A policeman's unarticulated plan has no bearing on the question* whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." (emphasis added).

The petition in this case simply asks this Court to decide, based on undisputed facts, whether the California Court of Appeal respected this Court's criteria in determining the reasonableness of the police seizure in this case. That question is properly presented to this Court. As stated in *Ker v. California* (1963) 374 U.S. 23, 33-34 (10 L.Ed.2d 726, 738),

> "Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here. (Citations omitted) While this Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental — *i.e.*, constitutional — criteria established by this Court have been respected."

As stated in the petition, the California Court of Appeal's decision on reasonableness in this case is in conflict with applicable and binding decisions of this Court. Moreover, this case gives the Court an opportunity to establish unmistakably that a police observation of a suspect in a public place is not subject to exclusion under the Fourth Amendment even if the observation was made during a detention which in some respects may have been unreasonable.

Review should be granted because this case involves two recurring questions under the Fourth Amendment: when does a suspect have a reasonable expectation of privacy? and, what protective measures may police reasonably take during a detention? This case presents those questions in an interrrelated form which reflects the complexity of circumstances in which policemen commonly find themselves. Law enforcement officers need the guidance of this Court in such matters. Accordingly, review should be granted.

## III

## THIS CASE IS NOT CONTROLLED BY *DUNAWAY V. NEW YORK.*

In *Dunaway v. New York* (1979) 442 U.S. 200 (60 L.Ed.2d 824) police received a tip from a jail inmate which implicated Dunaway in a murder, but it did not supply probable cause to arrest him. Nevertheless, the police took him into custody at his neighbor's home and transported him to the police station for questioning. Dunaway was not told that he was under arrest nor, apparently, that he was not under arrest.

The state conceded the seizure was not supported by probable cause. However, it argued a suspect may be taken to a police station for custodial interrogation on the

basis of a "reasonable suspicion" amounting to less than probable cause.

This Court held the police action was not a lawful detention within the meaning of *Terry v. Ohio* (1968) 392 U.S. 1 (20 L.Ed.2d 889) because the suspect was not merely questioned where he was found. Instead, the seizure was indistinguishable from a traditional arrest. Whether or not it was technically an arrest, the seizure so severely intruded on interests protected by the Fourth Amendment that probable cause was required to justify it. In short, this Court held a suspect cannot be transported by police to a police station without probable cause. The Court did not decide whether any detention would have been permissible in that case.

The instant case is completely different. The California Court of Appeal found the detectives had sufficient information, before stopping the suspect, to justify detaining and briefly questioning him at the scene of the stop (Petition, Appendix A, page A-3). Respondent does not argue to the contrary. Moreover, unlike the facts in *Dunaway v. New York, supra,* Detective Manis expressly told Mr. Radke he was *not* under arrest.

In addition, and more importantly, the Court of Appeal found the observation of Radke's hands at the scene of the stop on the highway gave the police probable cause to arrest him: "both parties concede this evidence (the hand injuries) along with that giving rise to the initial suspicion when taken together provide *probable cause for arrest*" (Petition, Appendix A, pages A-3 to A-4; emphasis added).

Thus, the transportation of Radke to the police station for questioning met the requirement of *Dunaway v. New York, supra,* that such a seizure be made only if it is justified by probable cause.

The California Court of Appeal did not hold to the contrary. Instead, it held the police acted unreasonably in displaying a weapon, ordering the suspect out of his car, and placing handcuffs on him. It held those actions transformed what should have been a lawful detention into an illegal arrest without probable cause.

The Court of Appeal impliedly assumed the suspect had a reasonable expectation of privacy in the appearance of his hands in a public place. It impliedly held his privacy was unreasonably violated by the handcuffing. Accordingly, it ordered the exclusion of the police observation of the suspect's hands.

In determining the legality of the arrest, the Court of Appeal subtracted the police observation of the hands from the totality of their knowledge, and concluded the remainder fell short of probable cause. Thus, the Court used a sleight of hand calculation of probable cause: now you see it, and now you don't. In *Dunaway v. New York, supra,* the police never had probable cause prior to transporting the suspect. Thus, that case does not control this one. Here, the police had probable cause, but the Court of Appeal held they could not use it to arrest the suspect because part of the information was not obtained properly.

Respondent, citing *Wong Sun v. United States* (1963) 371 U.S. 471 (9 L.Ed.2d 441), defends the Court of Appeal's decision by contending the evidence of Radke's hand injuries would not have come to light but for the illegal handcuffing, and thus the evidence must be excluded. Petitioner disagrees.

Respondent's contention is nothing more than an attempt to resurrect the "but for" argument which was repudiated by the Wong Sun case itself. The more apt consideration is whether the evidence was acquired by

means significantly distinguishable from the allegedly illegal act of handcuffing the suspect.

The handcuffing and the police observation of the injured hands are easily and significantly distinguished. The handcuffing impinged on the suspect's interest in liberty, whereas the observation of the hands did not impinge on any constitutionally protected interest under the circumstances. The legal right of the police to observe the suspect's hands in a public place did not depend upon the existence of a reasonable suspicion, probable cause, or any other criteria.

Moreover, the factual ability of the police to view the suspect's hands did not depend upon the handcuffing, but instead upon the suspect's display or exposure of his hands in a public place. Thus, the detective's use of his eyes to see evidence in plain sight in a public place was a means constitutionally distinguishable from the use of his hands to handcuff the suspect. The observation was essentially passive and nonintrusive, whereas the handcuffing involved an active and intrusive assertion of authority over the suspect. Accordingly, Respondent's argument must be rejected, and review should be granted.

## CONCLUSION

This case is one of great interest and importance not only to the parties directly involved, but also to the law enforcement community, the community at large, and all persons who have an interest in the fair and orderly administration of justice. Unfortunately, the decision of the Court of Appeal threatens to prevent a trial on the merits. It threatens to set loose an accused murderer on a "technicality". Such a result smacks of gamesmanship and is well-calculated to erode public confidence in the judicial system.

This case, of course, does not involve mere technical issues of legal procedure. Instead, it involves serious issues of constitutional magnitude. Accordingly, for the reasons stated in the petition and herein, Petitioner respectfully prays that review be granted.

Dated: December 20, 1988

Respectfully submitted,

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State of California
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## PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 20, 1988, I served the within Petitioner's Reply Brief in re: "The People of the State of California vs. Mark Alan Radke" in the United States Supreme Court, October Term, 1988, No. 88-914;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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Attorney at Law
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*Counsel for Respondent*

All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on December 20, 1988, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA